

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals  
Saad, C.J., and Fort Hood and Borello, JJ

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-VS-

**GEORGE EVAN FEEZEL**

Defendant-Appellant.

Supreme Court No. 138031

Court of Appeals No. 276959

Circuit Court No. 05-1254-FH

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**BRIEF OF AMICUS CURIAE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN**  
**IN SUPPORT OF DEFENDANT-APPELLANT**

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## **INTEREST OF AMICUS CURIAE**

The Criminal Defense Attorneys of Michigan (CDAM) is a statewide, nonprofit organization of public defenders, contract defenders and private attorneys. Since its founding in 1976, CDAM has provided continuing legal education for criminal defense lawyers. It has served as amicus curiae in many cases of significance to the criminal jurisprudence of this state, and appreciates this Court's invitation to continue that tradition in this case.

## **STATEMENT OF JURISDICTION**

The Criminal Defense Attorneys of Michigan accept that this Honorable Court has jurisdiction over this matter.

## STATEMENT OF QUESTIONS PRESENTED

- I. SHOULD THIS COURT CHANGE ITS LONGSTANDING RULE THAT EVIDENCE REGARDING THE DECEDENT'S NEGLIGENCE IS RELEVANT AND ADMISSIBLE IN DETERMINING PROXIMATE CAUSE IN CRIMINAL CASES?
- II. SHOULD THIS COURT REVERSE ITS DECISION IN *DERROR*, WHICH MISINTERPRETED THE DEFINITION OF "DERIVATIVE" TO INCLUDE 11-CARBOXY THC. THIS MISINTERPRETATION RENDERED MCL 257.625 UNCONSTITUTIONAL BECAUSE THERE IS NO RATIONAL BASIS FOR A STATUTORY SCHEME THAT PRESUMES A PERSON IS GROSSLY NEGLIGENT FOR DRIVING WHILE UNDER THE "INFLUENCE" OF A NON-INTOXICATING SUBSTANCE?

## **STATEMENT OF FACTS**

Amicus adopts the statement of facts of the Appellant.

**I. THIS COURT HAS LONG HELD THAT EVIDENCE REGARDING THE DECEDENT'S NEGLIGENCE IS RELEVANT AND ADMISSIBLE IN DETERMINING PROXIMATE CAUSE IN CRIMINAL CASES.**

It has long been the law in Michigan that juries determining guilt in cases where criminal *mens rea* is premised on the defendant's gross negligence must also hear evidence regarding the victim's own negligent conduct. This Court first confronted the issue in 1914, in *People v Barnes*, 182 Mich 179 (1914). In *Barnes*, a young woman was walking in the street when she was struck by a car and killed. This Court held that the young woman's conduct should be admitted and considered by the jury "as bearing upon the claimed culpable negligence of the respondent," specifically whether the defendant was the proximate cause of the girl's death. *Id.* at 195, 199. As this Court explained, the defendant would not be guilty of manslaughter "if a person willfully threw himself in front of the car and received injury." *Id.* at 195-196.

This rule was reaffirmed in *People v Campbell*, 237 Mich 424 (1927). In *Campbell*, the defendant hit and killed a married couple walking in the highway on a dark and misty night. The defendant testified that he was driving 20 miles an hour and did not see the couple until it was too late to avoid hitting them. *Id.* This Court explained that the conduct of the couple was relevant and admissible in the prosecution of the defendant for negligent homicide:

Considering the darkness, the misty atmosphere, the slippery condition of the pavement, their position in the highway, the fact that there was a safer place to walk, and their knowledge of the fact that automobiles would be constantly overtaking them from the rear, were the deceased, at the time of the accident, using ordinary care for their own safety? If they were not, that fact . . . would be an important factor in the case which the defendant would be entitled to have the jury consider.

*Id.* at 431. Thus, all of the facts affecting the wisdom of the couple's decision to walk in the road needed to be considered by the jury in determining whether the defendant was guilty. The Court

continued, while “[o]ne may have a right to amble all over a highway, but a man of ordinary prudence would hardly do so when it is filled with moving automobiles.” *Id.*

Most recently, in *People v Tims*, 449 Mich 83 (1995), this Court again addressed the issue of the admissibility of the victim’s conduct in a vehicular homicide case, and again determined that the conduct was relevant and admissible. In *Tims*, the defendant had been drag racing and then struck a pedestrian with a .09 BAC who had run into the street to retrieve a ball. Although there was no majority opinion in *Tims*, all participating justices agreed that the conduct and intoxication of the decedent was relevant and admissible. Justice Mallett, in an opinion joined by two other Justices, said of the rule that the jury should hear the evidence of the victim’s conduct: “This longstanding Michigan rule is no aberration. It appears to be the universal rule.” *Tims, supra*, at 98. In dissent, Justice Cavanaugh wrote, “The longstanding rule is that while the victim’s contributory negligence is not an affirmative defense, it is a factor in determining whether the defendant caused the resulting harm. We have no intention of altering that doctrine.” *Id.*, at 123.

Nor is there any reason for this Court to alter that doctrine now. The doctrine of criminal “gross negligence” and “proximate cause” at issue in *Barnes*, *Campbell* and *Tims* are the same as the one used by this Court in *People v Schaefer*, 473 Mich 418 (2005). Indeed, this Court cited *Barnes* and *Tims* with approval in defining gross negligence and the presumption of such for violation of MCL 257.625. And as Chief Judge Saad noted in his dissent in this case, intoxication is relevant in determining gross negligence in other criminal contexts. (Slip opn at 5) That it’s the gross negligence of the defendant being discussed in those cases is of no moment: intoxication is relevant to the determination of a person’s negligence.

Further supporting the conclusion that the victim's intoxication is relevant to the determination of proximate cause and gross negligence is the fact that such evidence is admissible in civil negligence actions. The Legislature has determined that a victim's intoxication is a complete defense to a liability action. Specifically, MCL 600.2955a provides:

(1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

The statute further defines "impaired ability to function due to the influence of intoxicating liquor or a controlled substance" if pursuant to MCL 257.625a a presumption would arise that the individual's ability to operate a vehicle was impaired. If intoxication can bar civil liability, it should certainly be at least relevant to a determination of proximate causation in a criminal case where the defendant faces imprisonment, not just a money judgment.

Thus, both this Court and the Legislature have deemed the intoxication of an injured person to be relevant and admissible (and, in the case of civil actions, dispositive) to a determination of proximate cause and gross negligence. The prosecution offers no caselaw from this state supporting the conclusion that evidence of the decedent's negligence is properly excludable on this particular issue. Instead, the prosecution posits a number of hypotheticals to try to prove its point. Rather than supporting the prosecution's argument, however, these hypotheticals simply highlight the flaw in the state's legal analysis. Take, for instance, the drunk person on the sidewalk who is struck and killed by a car. (Appellee's Br at 15) A pedestrian is not being negligent by walking on a sidewalk. A pedestrian may very well be negligent by, as the

*Campbell* court put it, “ambling down the highway.” It is certainly foolhardy to wander down a dark street in the rain. To do so when you are drunk, when your judgment and reflexes are impaired, is more negligent still. The blood alcohol level of the pedestrian in the roadway is part of the conditions that allow the jury to determine negligence: no different than the darkness, rain and the fact that there was an available sidewalk.

Going even further afield is PAAM, who eschews this state’s caselaw, relying instead on unpublished and unciteable Minnesota decisions to explain superceding cause. (PAAM Br. at 15) Nonetheless, apparently acknowledging the possibility that the victim’s intoxication is relevant to the question of proximate cause, PAAM claims that there is no Michigan case establishing “guideposts” for admissibility. To the contrary, this Court’s cases establish a clear guidepost: negligent conduct by the victim is admissible in the determination of proximate cause. *See, Barnes and Campbell, supra*. Ignoring these cases, PAAM urges this Court to adopt a new procedure set forth by a California Court of Appeals. In that opinion, the California court conducts an analysis based on shifts in thinking about tort liability in California and under the Restatement. The court further acknowledges that this shift in thinking about comparative liability is not applicable to criminal law. *People v Brady*, 29 Cal.Rptr.3d 1314, 1334 n. 10 (Ct App 2005). This Court should not accept PAAM’s invitation to turn its back on 95 years of its own precedent in favor of a single opinion by three judges of the California Court of Appeals.

**II. THIS COURT SHOULD REVERSE ITS DECISION IN *Derror*, WHICH MISINTERPRETED THE DEFINITION OF “DERIVATIVE” TO INCLUDE 11-CARBOXY THC. THIS MISINTERPRETATION RENDERED MCL 257.625 UNCONSTITUTIONAL BECAUSE THERE IS NO RATIONAL BASIS FOR A STATUTORY SCHEME THAT PRESUMES A PERSON IS GROSSLY NEGLIGENT FOR DRIVING WHILE UNDER THE “INFLUENCE” OF A NON-INTOXICATING SUBSTANCE.**

Amicus curiae urges this Honorable Court to adopt the analysis of Appellant Feezel and the dissent in *Derror* regarding the correct interpretation of MCL 257.625 and MCL 333.7212.

CDAM asserts that *Derror* was wrongly decided and should be reconsidered and rejected. This Court has not been afraid to correct its mistakes. *People v Gardner*, 482 Mich 41, 61 (2008) (“if a case was incorrectly decided, we have a duty to reconsider whether it should remain controlling law”) Frequently in recent years, this Court has observed that “stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes.” *Robinson v. City of Detroit*, 462 Mich. 439, 463, 613 N.W.2d 307, 320 (2000) (citing *Holder v. Hall*, 512 U.S. 874, 944, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994)). See, e.g., *People v. Gardner*, 482 Mich. 41, 61, 753 N.W.2d 78, 91 (2008) (overruling *People v. Preuss*, 436 Mich. 714, 461 N.W.2d 703 (1990); *People v. Stoudemire*, 429 Mich. 262, 414 N.W.2d 693 (1987)); *People v. Starks*, 473 Mich. 227, 236 n.8, 701 N.W.2d 136, 141 (2005) (acknowledging “we overrule precedent with caution,” but overruling *People v. Worrell*, 417 Mich. 617, 340 N.W.2d 612 (1983)); *People v. Davis*, 472 Mich. 156, 169, 695 N.W.2d 45, 52 (2005) (overruling *People v. Cooper*, 398 Mich. 450, 247 N.W.2d 866 (1976)).

*Robinson, supra*, provides a very thorough guide to the factors a reviewing court must consider when determining whether to overrule precedent, drawing heavily on United States Supreme Court decisions for that guidance. To begin, “stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope,

intrinsically sounder, and verified by experience.” *Robinson*, 462 Mich. at 464 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940)). Stare decisis is not an “inexorable command.” *Id.* (citing *Hohn v. United States*, 524 U.S. 236, 251, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998)). A court need not follow precedent “when governing decisions are unworkable or are badly reasoned.” *Id.* (citing *Holder v. Hall*, 512 U.S. 874, 937, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994)).

Other considerations include “whether the decision at issue defies ‘practical workability,’ whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision.” *Id.* (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 853-856, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). Those reliance interests lead the *Robinson* Court to a caution: “[T]he Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone’s expectations that to change it would produce not just readjustments, but practical real-world dislocations. It is in practice a prudential judgment for a court.” *Id.* at 466. Of course, this Court has also said “we find it difficult to conceive any possible situation in which a ‘reliance interest’ would ever exist in the context of a criminal statute.” *Schaefer, supra*, at 434 n 51.

The dissent in *Derror* sets forth cogently the reasons the majority opinion was incorrect. In particular, the majority acknowledged that “derivative” could be defined differently, and then selected the dictionary definition that it felt most embodied the Legislature’s intent. That choice was curious since it came from a medical dictionary and the statute is describing not a medical term, but rather a biological or chemical one. The *Derror* majority erred further by looking to the intent of the Legislature in adopting MCL 257.625, not in drafting the definition of marihuana, to determine the meaning of the term “derivative.” What the Court should have been looking at is

the intention of the members of the U.S. Congress in 1937. The MCL definition of marihuana in section 333.7106(3) is identical to the federal definition of the term enacted as part of the Controlled Substances Act of 1971. *See* 18 USC § 802; MCL 335.305(3), P.A. 1971, 196. The U.S. Congress adopted its definition, without change or comment, from the Marijuana Tax Act of 1937. *US v Walton*, 514 F2d 201, 203 (DC Cir 1975). Its hard to imagine that the members of that Congress were using the definition of the term “derivative” from a medical dictionary.

Furthermore, the holding that 11-carboxy-THC is a schedule 1 controlled substance for the purpose of MCL 257.635(8), but apparently not for the purposes of the Controlled Substances Act is utterly unsupported by anything in the language of either statute. A Schedule 1 controlled substance is defined as one that “has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.” MCL 333.7211. 11-carboxy-THC has no potential for abuse because it has no pharmacological effects. MCL 257.635(8) provides no support for a conclusion that a substance could be a schedule 1 controlled substance for purposes only of the driving under the influence statute.

*Derror* should also be overturned because changes in the law render it questionable. The majority assumed that all use of marijuana was illegal and so anyone with any amount of 11-carboxy-THC had ingested the drug illegally. *Derror, supra*, at 336. After *Derror* was decided, Michigan voters approved the Michigan Medical Marihuana Act, which became effective December 4, 2008. That legislation permits and regulates the use of marijuana for medical purposes. MCL 333.26421 *et seq.* The presumption underlying the portion of the decision upholding the constitutionality of the statute specifically relies on the incorrect assumption that anyone with 11-carboxy-THC in their body is a criminal. As the law stands today, they could be

a terminally ill cancer patient using the drug in a perfectly legal manner: until they drive two days later, when the non-intoxicating 11-carboxy-THC is still coursing through their veins.

Under the *Derror* decision, cancer patients legally participating in the Medical Marihuana Program can be transformed into unwitting criminals every time they drive. As the *Derror* opinion acknowledges, 11-carboxy-THC remains in the body for days long after the intoxicating effects wear off. Nonetheless, under this Court's decision in *Derror*, if that cancer patient drives with any amount of 11-carboxy-THC in his system, he has violated MCL 257.625(8).

Taking the analysis a step further demonstrates the error in the original *Derror* decision as well as its unconstitutionality. Our cancer patient smokes on Tuesday to relieve the nausea of chemotherapy. On Thursday the patient, no longer feeling the effects of the marihuana, drives. Unbeknownst to the patient, a small amount of 11-carboxy-THC is still in their body. Proceeding legally through an intersection they are hit and injured by a drunk driver who ran the red light. Their presumed "gross negligence" under *Derror* and *Schaefer* is now an intervening cause, even though they were following traffic laws and even though their "intoxicated" state did not cause the accident.

The fact that our cancer patient did not, and could not, know that 11-carboxy-THC is in their body shows that this Court's interpretation of MCL 257.625 rendered it unconstitutionally vague and overbroad, and so a violation of due process. US Const, Ams V, XIV; Mich Const 1963, art 1, § 17. Criminal statutes must be clear and definite so a person of reasonable intelligence is aware of prohibited conduct. "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits...." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). People do not know if 11-carboxy-THC is still in their system,

and would further be shocked to learn that their perfectly legal ingestion of marihuana becomes a crime days later if, but only if, 11-carboxy-THC remains in their system. People would violate this law not intentionally, not even recklessly (because they could tell they were still intoxicated) but rather utterly unknowingly.

This hypothetical also demonstrates that this Court's interpretation of MCL 257.625 is unconstitutional because it is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v Employment Security Comm*, 410 Mich 231, 271 (1981). The objective of the statute is to prohibit intoxicated driving. The scientific evidence, cited in the *Derror* opinion is clear: driving with 11-carboxy-THC is not intoxicated driving. The statute is not discouraging people from driving while under the influence of 11-carboxy-THC because a person cannot, scientifically, be under the influence of the metabolite. Also, since they cannot know how long the metabolite remains detectable, they are most likely not intoxicated and so are not a danger to others. Nonetheless, *Derror* imposes on them an irrebuttable presumption of gross negligence, subjecting them to greater criminal liability and potentially freeing other, actually intoxicated drivers from the full consequences of their actions.

This Court should right the wrong it created in the *Derror* decision and reject the strained reading of the statute that led 11-carboxy-THC to be considered a schedule 1 controlled substance for purposes of MCL 257.625(8).

## **SUMMARY AND RELIEF SOUGHT**

The Criminal Defense Attorneys of Michigan urges this Honorable Court to vacate Mr. Feezel's convictions and sentences. Amicus would further request that this Court follow its longstanding rule that the conduct of a victim is relevant and admissible in determining proximate causation. Amicus further asks this Court to reverse its opinion in *Derror, supra*.

Respectfully submitted,

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